

*Judicial Branch of the Nation*

Case File: 3223/02 "A. V ET AL VS. THE STATE RE:  
AMPARO OR RELIEF PROCEEDING"

///nos Aires, FEBRUARY 27, 2004. [Illegible signature]

**CONSIDERING:** the proceedings herein, ready for sentencing;

**WHEREAS:**

1. On pp. 21/34, A.V. and C.M., in their own right, and the Center of Legal and Social Studies (*Centro de Estudios Legales y Sociales* - hereinafter CELS) appear for the purposes of filing a petition for the issuance of a writ of *amparo* or relief proceeding against the Executive Branch of the State - Ministry of Health - for the purposes that the defendant be ordered to take all relevant measures to resume and guarantee the continued, uninterrupted delivery of the medication required by A.V., C..M. and all parties afflicted by HIV, so that they may continue the treatment of their illness without interruption.

The parties have alleged that the filing of this petition comes as a result of the interruption of the regular provision of drugs included in the National Aids Program. On this basis, they demand that that the Executive Branch implement the policy that it itself designed in order to guarantee all sufferers access to treatment of the disease (in strict conformance with Law 23798).

In grounding the admissibility of this petition in law, the petitioner provides documentary evidence to support

the relevance of the prescription for the medication requested, and as well as newspaper articles that indicate that several indispensable medications for combatting Aids have become unavailable in different jurisdictions of the country. They maintain that the situation described above has caused the petitioners, in an individual capacity, and other parties afflicted by the illness to suspend their treatment, thus seriously jeopardizing their health and lives.

2. On pp.35/7, the practicality of the petition for the issuance of a writ of *amparo* or relief proceeding is accepted, and the report provided for in Article 8 of Law 16986 is demanded from the Executive Branch. Moreover, the provisional recourse solicited is duly admitted, with the State - Argentine Ministry of Health - ordered to continuously and regularly deliver the medications indicated by the treatment professional to the petitioners and all persons afflicted by HIV based on their individual medical requirements, and until the writ of *amparo* or relief proceeding issued is invalidated. The collective writ of *amparo* or relief proceeding was also stressed as being - *prima facie* - admissible, given that HIV is a highly contagious disease that places the health and lives of the entire community at risk.

3. Following these proceedings, the State answers the summons provided for in Article 8 of the Law of *Amparo* or Relief Proceeding (pp. 87/94), and asserts that the case in question is not of a judicial nature since no acts or omissions of public authorities have currently or imminently

injured, restricted, affected or threatened, in a way that is manifestly arbitrary or illegal, any of the petitioner's rights recognized by the Constitution. The defendant therefore pleads that the petition for the issuance of a writ of *amparo* or relief proceeding under study be declared inadmissible.

4. On pp.490/4, the party answers the summons contained on p. 87 and requests that a judgment be rendered.

**CONSIDERING:**

I. It is first necessary to identify the right deemed to have been violated. In this respect, the right concerning us in this case is the right to health, which is regarded as a fundamental human and civil right (cf. Case 3/52950 "B.M.E. re: *Amparo* or Relief Proceeding, of the First Transitional Court for Criminal and Correctional Matters of Mar del Plata, published in *J.A. 6166* on bioethics, on 3/11/99, with comment from Carlos A. Gherzi). The appraisal of this right requires a multidimensional approach because, in addition to its nature as an individual right inherent to personal dignity, it is also of important social and economic value, since it is intrinsically linked to the development and production of society (cf. Luis R. Carranza Torres; *Derecho a la salud y medidas cautelares, (The Right to Health and Precautionary Measures) El Derecho* 02/20/04).

For the above reasons, the right to health is considered a basic human right and has been adopted by the Argentine Constitution with dual force in the form of implicit rights and the international treaties enshrined in the

Constitution. Here, it bears stressing that the declaration of rights stated in the Argentine Constitution, including implicit rights, does not indicate the intention of the state in recognizing the existence of individual rights; rather, it constitutes a concrete undertaking by the state to establish and observe all necessary legal provisions to this end (cf. above mentioned doctrine).

In this respect, it is worth highlighting that General Comment No. 14 of the Committee on Economic, Social and Cultural Rights states that "the right to health is not to be understood as a right to be healthy. The right to health contains both freedoms and entitlements... The entitlements include the right to a system of health protection which provides equality of opportunity for people to enjoy the highest attainable level of health... Consequently, the right to health must be understood as a right to the enjoyment of a variety of facilities, goods, services and conditions necessary for the realization of the highest attainable standard of health".

This Comment goes on to state that "health facilities, goods and services must be affordable for all... including socially disadvantaged groups."

Having analyzed the importance of the right to health in legal doctrine, it is worth stressing that Aids is a serious global issue, with 36 million people currently living with the virus or the disease, according to a report by UNAIDS (Joint United Nations Program) and the WHO, with a further 21.8 million people having died since the epidemic began.

II. The writ of *amparo* or relief proceeding is a rather simple procedure in respect of time and formality, and its basic goal is to remedy any injured constitutional right as swiftly as possible (cf. Palacio L. E., *Derecho Procesal Civil*, Vol. 7, p. 137; First Chamber of the Court for Criminal and Correctional Matters; Case 30,317/95).

In the case under study, the right to health deserves dual consideration, in the face of two differentiable legal situations: the first where one party is claiming for individual care or treatment; and the second where an individual representing a group or category of people are claiming for collective action. In this respect, health care enables a collective approach, since some cases - such as the one concerning us - involve a number of factors that can potentially impact on the health of the entire population, and therefore the planning and provision of services, as well as the health needs of individuals, must be addressed collectively.

Moreover, in respect of the petition filed for the issuance of a collective writ of *amparo* or relief proceeding, it is of note that the 1994 constitutional reform extended the base of individuals legally entitled to bring legal action of this kind, thus qualifying the party affected, the ombudsman and civil associations before the courts. In this case, we refer to such acts or omissions alleged as manifestly arbitrary, illegal or unconstitutional, which injure or threaten the rights that they are intended to promote or

pursue, and for which they were specifically created.

A further condition that must be met for the issuance of an individual or collective writ of *amparo* or relief proceeding is the failure to promptly provide the elements requested by the petitioners, individually, or by all persons afflicted by the disease, collectively. Having proven this fact, the issuance of a writ of *amparo* or relief proceeding is fully justified.

Therefore, no other legal avenue exists to remedy the injury caused with the urgency required in this case, with Article 32 of the Argentine Constitution - in accordance with the 1994 reform - having introduced a crucial amendment aimed at giving the writ of *amparo* or relief proceeding a particular force by divesting the instrument of formal facets that acted as an obstacle to attaining immediate access to the jurisdiction when challenging constitutional guarantees (cf. Palacio, "La Pretensión de *Amparo* en la Reforma Constitucional de 1994 (*Amparo* or Relief Proceeding Pretensions in the Constitutional Reform)", LL, 09.07.95).

As such, the writ of *amparo* or relief proceeding serves as a constitutional guarantee, and therefore all hermeneutics must focus on the protective purpose of this guarantee through a prescient interpretation that must grant the writ of *amparo* or relief proceeding the widest possible scope for the purposes of ensuring the effective protection of basic rights in crisis (cf. Adolfo A. Rivas "El *amparo* e intervención de terceros (*Amparo* or Relief Proceeding and the Intervention of Third Parties)" in J.A 12/24/97).

III. Following this line of thought, it is worth noting that the Legislative Branch had already approved the American Convention on Human Rights by 1994 (JA 1994-B-1615), of which Article 25, paragraph one, sets forth the obligation of States Parties to legislate for constitutional protection, stating: "Everyone has the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights recognized by the constitution or laws of the State concerned or by this Convention, even though such violation may have been committed by persons acting in the course of their official duties". As such, the 1994 constitutional reform - with the clear purpose of complying with the International Convention - saw the insertion of Article 43 into the Constitution.

In this respect, the regulations stipulated therein are not merely rhetorical or intimated statements; rather, they are full constitutional rights that carry a normative force (cf. Germán Bidart Campos "Las transformaciones constitucionales en la postmodernidad (Constitutional Transformation in the Post-Modern Era)" Ediar, Bs. As, 2000 p. 16 et al.

In view of the above representations, it can be concluded that the viability of a writ of *amparo* or relief proceeding is dependent on the absence of any other suitable judicial instrument that would protect the right violated, where it must be proven - without the need for further

evidence or debate - that the illegality or arbitrariness alleged against an action is clearly demonstrated and that the use of any other judicial recourse would involve delays or inefficiencies that would render the guarantee useless, and cause serious and specific risk to the injured party as a consequence (cf. Gelli, María A. "La Silueta del *amparo* después de la Reforma Constitucional (The *Amparo* or Relief Proceeding Silhouette and Constitutional Reform)" LL 1995-E-978)

Moreover, Article 43 of the Argentine Constitution must be interpreted with due reasonability; or rather, it must not leave fundamental rights unprotected, but neither should it confer the writ of *amparo* or relief proceeding a value as the sole available judicial instrument, since this exceptional recourse would otherwise engender the false belief that any matter of controversy can be resolved using this avenue, or that it could bring about early rulings of unconstitutionality.

IV. At this point in the proceedings, it is necessary to analyze the standing of the petitioners in the action.

First of all, it is clear from the documentation provided in the petition that A.V. and C.M. have the standing to take legal action in the matter - a fact that has not been contested by the opposing party - and the petitioners provide sufficient evidence for their standing in this action to be recognized.

Secondly, we must analyze the standing of the CELS



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to submit pleadings in this procedure.

According to its Statutes (cf. pp. 13/20), the CELS is an Association whose goals include the "protection of human dignity, popular sovereignty [and] community wellbeing", and it has the power "to promote and implement administrative and judicial actions focused on ensuring the effectiveness of these principles and values, representing individuals and groups of injured parties in cases for which successful resolution shall constitute the protection thereof, and... to challenge all violations, abuse and discrimination that affects the rights and freedoms of individuals and society for religious, ideological or political reasons".

Here, the phrase "human dignity" can be understood as the defense of the right to life, which encompasses the right to health and the care thereof, which is one of the central pillars of human existence. Since the petitioner has the power to bring court action aimed at "ensuring the effectiveness" of this principle, its standing to submit pleadings in this action must be recognized. Furthermore, in view of the seriousness and public awareness of Aids in our society, and of the situation challenged - in which the delivery of medication under the government Program has been suspended - it is clear that the Association has merely acted to exercise its right to take legal action by filing this petition, which is in keeping with the purposes for which the entity was created.

We must also cite the decision of the Hon. Supreme

Court of Justice of the Nation in "Mignone Fermín re: Writ of Amparo or Relief Proceeding" of April 9, 2002, which recognized the standing of the petitioner herein to take legal action in representation of rights with collective repercussions, as is the case of HIV (cf. opinion of Petracchi and Fait, Considering clause 6; of Bossert Considering 11 and subs., and Boggiano, Considering 2).

Consequently, the standing of CELS to file this petition for the issuance of a writ of *amparo* or relief proceeding must be recognized [illegible text] 12.17.02.

V. In respect of the admissibility of the legal action initiated, the failure to promptly deliver the medication included in the National Aids Program and the obligation of the State to guarantee this treatment have been proven as facts, with no further evidence or debate required.

This is evident from the State's assent to Law 23798, which declares that the fight against Aids, and the pathologies derived therefrom, is in the national interest, as are measures aimed at preventing it from spreading.

Thus, the State has entered into an obligation which, if violated, not observed under the prescriptions of the law, or not observed in a timely manner, would make legal action viable. It is clear evident that the assumed obligations were violated in the case before us, as evidenced through the countless statements made throughout this process concerning various breaches by the defendant, as well as those made by new petitioners that have participated in the trial by virtue of the provisional collective instrument issued.

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The CELS does not request in this writ of *amparo* or relief proceeding that a specified health policy be implemented or that legislation be passed so that all persons with HIV receive all medication necessary for treatment from the State; rather, the petition pleads that the necessary means be provided for the State to observe the obligation that it itself entered into.

Moreover, the defendant produced no documentation to suggest that it had been continuously and uninterruptedly supplying the medication requested by treating physicians for the continued treatment of the petitioners. We can therefore conclude that serious risk could be caused to all parties afflicted by the virus.

In other words, it is not unusual for the petitioner to have resorted to this legal procedure, since the STATE has not provided the health care requested in a timely manner, thus affecting its basic right to health as enshrined in the Constitution. The limitation of this right is expressly prohibited by all treaties on Human Rights listed in Article 75, Subsection 22 of the Argentine Constitution.

Therefore, on account of the fact that the petitioners, in their own right, and the CELS, have simply acted to enforce the rights due to them, this proceeding is wholly admissible. In addition, as well as having a profound social impact, this also constitutes a significant medical, psychological, social, economic and legal issue (cfr. *Revista de la Asociación de Magistrados y Funcionarios de la Justicia*

*Nacional 24*, p. 168), and therefore if an alternative legal avenue were to be chosen, this would place the health of the entire community in jeopardy, and the petition is therefore justified.

At this point in the proceedings, it should be stressed that the preliminary administrative procedure required to ensure the acquisition of the specific drugs in question cannot constitute an obstacle to the availability of the medication in question, since it has been proven that the control bodies were slow in carrying out their actions, despite the lives of an entire community being at stake.

In view thereof, it is also worth highlighting that the purpose of the writ of *amparo* or relief proceeding is to serve as a principal alternative - rather than a subsidiary - instrument, directly usable and aimed at ensuring the effectiveness of the constitutional rights (cf. *Ley de la Provincia de Buenos Aires 2002 No. 4*, May: cf. First Transitional Court for Criminal and Correctional Matters of Mar del Plata: "F.E.B. re: *amparo* or relief proceeding", of 10.30.2001, p. 408), and therefore the petition before us is admissible for the protection of the jeopardized rights.

VI. Before we begin to analyze the arguments made by the parties in support of their respective positions, we shall first set forth the parameters that will be used to study the matter.

First of all, the exercise of the rights recognized by the Constitution, including the right to health, requires no justification whatsoever; rather, justification

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must be made when these rights are restricted in any way.

It is essential that medical care is provided based on the needs of the petitioners, since health is an indispensable "substratum" for the exercise of their rights, and is a prerequisite for enjoying the best attainable standards of life despite the condition (cf. First Court for Criminal and Correctional Matters of Mar del Plata, 9.13.99: "B.M.E. re: *Amparo*"; *Ley de la Provincia de Buenos Aires 2000 No. 3*, p. 334).

Secondly, it is important to clarify that the duty to protect civil rights is not exhausted merely by the State observing its abstention obligations, and positive action is also required, such as positive regulation aimed at defining the scope and limitations of these rights (cf. "El Derecho a la Atención Sanitaria como Derecho Exigible (The Right to Healthcare as a Demanded Right)" by Víctor Abramovich and Christian Curtis, published in *La Ley, Suplemento de Derecho Administrativo* on 06/25/01).

Thirdly, the passing of Law 23798 has established a convention between government and society, and it is these sectors that are primarily bound by the future consequences of all decisions taken. Therefore, given the public authorities' recognition of the impact and importance of the issue in the community, the Judicial Branch is legally entitled to hold government agencies to the policy decision undertaken under law (cf. LL 1888-F: "La protección de la salud como un derecho de incidencia colectiva y una sentencia que le ordena al

Estado que cumpla aquello a lo que se ha comprometido (Health protection as a collective incidence right and a judgment that orders the state to comply with what it has committed to)" by Eduardo Martehikian). This is because the judicial function has not been exhausted under the letter of the law when it has abstained from effectively enforcing the above mentioned right, and before any formal ruling is made it is appropriate to adhere to the principles enshrined in the Argentine Constitution borne out of the need to serve the common good, which in turn shall be understood as the set of social life conditions that enable the highest attainable standard of this right to be implemented for the community and each of its members (cf. Fourth Chamber of the Federal Court in Administrative-Law Matters: "Viceconte, Mariela vs. Ministry of Health and Social Action re: *Amparo* or Relief Proceeding).

Fourthly, we must not lose sight of the fact that human rights must be ring-fenced to make them impenetrable and impermeable by the State, which restricts its actions and ensures the recognition of the guarantees arising therefrom; indeed, this is why fundamental rights are presented in legislation as a set of basic values, and as the protective framework guarding against legal subjectivity (cf. *Revista de la Asociación de Magistrados* [illegible text] 24, p. 167.)

In this respect, the Inter-American Court of Human Rights [illegible text] "Velázquez [illegible text] Honduras" and "Eriksson C. Italia" has [illegible text] primary obligation of the States Parties [illegible text] the American Convention on Human Rights. The [illegible text] obligation of

the States Parties to ensure to all persons under their jurisdiction the free and full exercise of the rights recognized by the Convention [illegible text] this obligation makes it the duty of States Parties [illegible text] organize all government apparatus, and all general structures through which popular power can be exercised, thus ensuring that they are able to guarantee the free and full exercise of human rights in law. However, the obligation to guarantee these rights is not exhausted by the enactment of a legal provision intended to facilitate the observance of this obligation; rather, it requires the government to take actions to ensure this intention is implemented in reality. As such, the State must respect the health of its residents, and is not only prohibited from taking direct actions that may impact negatively in this sense, but it must also guarantee, just as rigorously, an adequate health system to all residents, enabling them to get back to full health (cf. *El Derecho* 02/20/04, p. 1/3: "Derecho a la Salud y Medidas Cautelares" by Luis R. Carranza Torres).

VII. Subsequently, it is appropriate to study the applicable legal provisions before handing down a ruling on the case before us.

We shall first look at how the Argentine Constitution deals with the right to health, before assessing the regulation applicable (Law 23798) to the case under study. We will then analyze how legislation deals with the right to health in crisis situations such as the present case, before

comprehensively assessing the reasonability of the decision taken by the Executive Branch in relation to the interruption of its delivery of medication to persons with HIV.

From a constitutional perspective, the goal of the 1994 reform of the Constitution was to protect the health of the residents of Argentina. On the basis thereof, the legislature has - for some time - been trying to deal with the issue of the protection of the right to health through a number of different regulations in the interests of delivering on this constitutional requirement. This is important because, as mentioned in the previous clause, the obligation of the State can only be exhausted through a positive - as well as a negative - provision, which in this case is the passing of legislation aimed at protecting fundamental rights (such as the right to health and life).

The above demonstrates that the Legislative Branch delivered on its obligation to enact a positive provision by passing legislation that guarantees the right to health. However, this legislation must also be effectively enforced, otherwise the content of international instrument on human rights, the Argentine Constitution and effective legislation would be shown to be empty.

In continuing to analyze the obligation established by the Argentine Constitution, we must not lose sight of the fact that the new - constitutionally binding - legislation that has come into effect since 1994 provides a list of international treaties on Human Rights, which intimate that the State is obligated - as a primary or secondary



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obligation - to guarantee the health of all residents.

The above conclusion is drawn on the basis that these international conventions contain specific clauses that protect the life and health of individuals, as per Article VII of the American Declaration of the Rights and Duties of Man; Article 25, Subsection 2, of the Universal Declaration of Human Rights; Article 4, Subsection 1 of the American Convention on Human Rights (Pact of San José); Article 24, Subsection 1 of the International Covenant on Civil and Political Rights, and; Article 12 of the International Covenant on Economic, Social and Cultural Rights, in relation to the special care and assistance that must be guaranteed.

Specifically, the latter covenant recognizes the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, and the duty of all States Parties to achieve the full realization of this right.

The above demonstrates the concern shown by the framers of the Constitution to ensure that the State legislates to protect the lives of individuals. Following this line of argument - as is appropriate under the Constitution and case law in this matter - we can safely assert that it is unreasonable to place the physical wellbeing of parties at risk by failing to provide them with the medication necessary to fight a disease, particularly when the justification for this refusal lacks any legal basis and is grounded on nothing more than formal rigorism with the concealed aim of deriving an economic benefit.

In this context, the overriding goal of the Argentine Constitution, as expressed in its Preamble, is to achieve general wellbeing, which is to say that social justice, which currently consists of the organization of the intersubjective activity of members of the community and the resources thereof with a view to ensuring that all of its members share in the material and spiritual goods of society. Thus, the declaration of rights stated therein does not merely indicate the intention of the state, but rather is a firm commitment undertaken by the state to establish and fulfill all necessary legal provisions to this end; in other words, it has committed itself to organizing all services and benefits provided for therein. These "social rights" established in Article 14 bis of the Argentine Constitution, which include the right to health, do not grant individuals a right to take legal action; rather, they grant them the powers to claim certain benefits from the State when it has put such a service in place (cf. Fourth Chamber of the Federal Court in Administrative-Law Matters: "Viceconte, Mariela vs. Ministry of Health and Social Action re: *Amparo* or Relief Proceeding).

Furthermore, the right to life, as well as the right to health and psychological and physical wellbeing, were already recognized prior to the constitutional reform, as inferred from a dynamic and axiological interpretation of the previous Argentine Constitution. However, following the 1994 reform, this right is now deduced from all international conventions incorporated into Article 75, Subsection 22 of the Constitution.

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We can therefore ascertain that the right was protected by Articles 53/60 of the previous Constitution, and was reinforced in the 1994 reform with the inclusion of the Treaties of Human Rights (Article 75, Subsection 22), all of which make explicit reference to the protection of the right to life.

In conclusion, the right to health is a corollary of all people's right to life and physical wellbeing.

Thus, not only must we take the utmost care over the principles and values that influence the design of a fair health system - principles and values inherent in human dignity (cf. "Los fundamentos filosóficos de los Derechos Humanos (The Philosophical Foundations of Human rights)" p. 19, Serban Unesco 1985) - but we must also ensure the genuine right of access to a health system that guarantees the effective exercise of the constitutional right to health.

By virtue of the above, and given the legal interest before us, the Constitution provides for the protection of life and health on a non-conditional basis, since not to do so would imply an aggravation or failure to address the needs of the aggrieved parties.

This brings us to analyze the terms of the submission on pp. 130/1 from the Ministry of Health, which states that "it should be taken into consideration that the stabilization of the country's economic and financial situation will free up sufficient budgetary resources for the acquisition of the supplies requested by patients treated

under the National Aids Program in due time and form". This statement only serves to corroborate the breach of its obligation to deliver medication under the Program in due time and form, and the flagrant violation of the constitutional principles analyzed above.

VIII. (sic) This being the case, it is appropriate to analyze the provisions of Law 23798, without overlooking the fact that Decree 385/89 already implied that the STATE was concerned with the treatment of HIV, prior to the enactment of this law.

This is because Decree 385/89 established the National Aids Commission under the auspices of the Ministry of Health and Social Action, whose functions include the design of political health strategies for the prevention and control of HIV, the coordination of the actions of government agencies directly or indirectly intended to address the issue of HIV and Aids, and the contribution - through its agencies - to the dissemination of information and health education (cf. "Responsabilidad del Estado por contagio de SIDA en establecimiento asistencial (State Responsibility in HIV Contagion in a Welfare Establishment)" Fernando Alfredo Sagarna; *LL. Provincia de Buenos Aires, 1998*, No. 11).

This Decree only serves to demonstrate that, prior to the enactment of the Law mentioned above, the State was fully intent on dealing with the issue in question, a fact reinforced through the enactment of Law 23798, which declared that the fight against Aids, and all actions aimed at preventing it from spreading, were in the national interest.

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As such, the rollout of programs aimed at the disease's treatment, prevention, care and rehabilitation was made compulsory (cf. Articles 1, 3 and 4 of the above mentioned law). It is clear from the above that the goal to protect public health influenced the Law's provisions, and therefore, regulations relating to the disease, and its treatment and control, cannot be quashed, suspended or reframed, with the risks involved for carriers of the virus, depending on the interests of the Executive Branch.

One particular feature of Law 23798 is its generality, which is a common characteristic of legal provisions regulating human rights (cf. p. 12: "El Derecho a la Atención Sanitaria como Derecho Exigible" by Abramovich and Courtis, published in *La Ley Suplemento de Derecho Administrativo* (Supplemental Law in Administrative Jurisprudence), 6/25/01), given that it is these regulations that have the highest level of generality in law. This characteristic gives greater flexibility and adaptability to normative instruments that are regularly amended, and offers agencies responsible for stipulating the content of rights a margin of choice compatible with the prudence and need for swift appraisal required in a judgment (cf. above mentioned doctrine). As such, the generality of the Law does not make it entirely impossible to highlight cases in which the right is violated.

On this point, it is worth noting that the regulation, according to Cossio, creates the *raison d'être* of

the right, but does not create its objective (see Cossio, Carlos "La Teoría Ecológica del Derecho y el Concepto Jurídico de Libertad (The Ecological Theory of Law and the Legal Concept of Liberty)" p. 282 Abeledo Perrot, 1964).

On the same lines, if we consider the purposes and goals of creating the regulation, it is worthy of note that this regulation considered Aids to be a significant health issue due to the damage caused both in terms of morbidity (number of people transmitting the disease) and mortality (number of people dying as a direct or indirect consequence of its effects).

The pathology causing this damage, leading to disease and loss of life, is easily diagnosed (detected by a simple blood test) and its treatment - when initiated early and in the absence of noncompliance or delays in the delivery of medication - provides hope of a better life to those afflicted by the illness. Therefore, HIV carriers require [illegible text] the delivery of the medication currently indicated for the treatment of the disease and related pathologies, as well as other drugs that must be used in combination.

Furthermore, the policies to be pursued in this issue, and where efforts will be focused, have been made clear - both in the Legislative and Executive Branch - in the Law under analysis, in parliamentary debates on the matter and in the regulatory decree; therefore, any harmonic interpretation of the Law draws us to conclude that its primary goal is to guarantee all residents of the nation access to Health

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Services, which we understand as the set of promotional and preventative actions and resources for the provision of care and rehabilitation.

Clearly, then, the State has expressly designed and appraised a guiding policy targeted at ensuring access to medication, as well as appropriate and comprehensive treatment, to all persons with HIV.

IX. By the same reckoning, the State has clearly taken positive actions in this issue, which has caused concern as a result of its high level of contagion, and it has been motivated to legislate in its regards.

These positive actions are generally intended to ensure equal treatment by clearing away the cultural barriers that dictate and limit equality in practice. By taking the decision to pass Law 23798, the State has merely delivered on the stipulations set forth in the Argentine Constitution, of which Article 75, Subsection 23 includes provisions on equality and another on social security, and regulates the positive actions that the State has chosen to adopt in the above mentioned Law; therefore, not only does its failure to deliver on the provisions that it itself undertook to - through the enactment of said regulation - result in an incoherent set of actions (by enacting and undertaking to something that it would not deliver on), but it would also generate responsibilities in the field of international law.

Moreover, the obligation of the defendant will not be extinguished merely by delivering the medication in the

event of a court order; rather, it must ensure the continuity and regularity of treatment in view of the State's undertaking to public health. This fact, in the case in question, is aggravated by the political decision of the State - in the Law under analysis - to undertake to address the critical health problem that causes Aids.

We can therefore acknowledge that the STATE has an inescapable duty to freely, regularly and continuously deliver all medication required to treat all residents of Argentina afflicted by the illness, since any failure to do so would affect the rights to life and health of the individuals concerned.

Deserving of a paragraph of its own is the action taken by the State to subject the delivery of medication to an administrative procedure which, rather than being straightforward, informal and swift, involves a delay that could harm the health and potentially risk the lives of people with HIV (cf. Supreme Court of Justice in the records of: "Asociación Benghalensis et al vs. the State", 2000/06/01, *La Ley*, 2001-B. 126; Third Chamber of the Federal Court in Civil and Commercial Matters, 2002/9/17 AC, M.J.A. vs. National Institute of Social Services for Retirees and Pensioners et seq).

The documentation inserted in pp. 349/372 shows that the defendant has fallen into specific breaches in the implementation of the Aids Plan, a fact supported by several individual petitions (pp. 233/4; 236/8; 300/5; 306/9; 322/5; 332/5; 381/3; 415/7; 419/24; 429/32; 439/40 and 454/9), which



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report that HIV carriers on the Program are not receiving the relevant supplies.

X. We shall now analyze whether there has been any liability on the part of the STATE. In doing so, we shall consider two factors (cf. as done by the Supreme Court of Justice in the Judgment "Campodónico de Beviacqua vs. Ministry of Health Programs re: *Amparo* or Relief Proceeding" del 10.24.2000): its capacity as guarantor of the integrated health system adopted by the State itself under the provisions of the Law; and the previous behavior of the State, considering that it had been performing the obligation in question before the legal action was brought.

On the first point, case law dictates that the State, as guarantor, is responsible for providing the resources necessary to tackle the illness, including screening, professional care and treatment, the provision of medication and hospital care.

Therefore, in situations such as the one before us, where the foresight capacities of individuals or small communities are exceeded, the STATE is bound, as primary guarantor of the health system, to provide the resources necessary to ensure health care coverage to all residents free of social, economic, cultural or geographic discrimination under the principal of social solidarity. This is provided in the interests of ensuring the rights to life, personal dignity and general wellbeing, protected by the Constitution in its Preamble, and Articles 33 and 42, as well as the International

Conventions incorporated therein.

In this way, it is clear that the STATE has a leading role in this area, and that the Ministry of Health and Social Action is the authority responsible for ensuring the regularity of health treatment.

As for the second issue for analysis, we refer to the decision of the Hon. Supreme Court in the above mentioned proceedings, in which it maintained that state discretion is a limiting factor for the observance of a social right in that, when the *de facto* situation is maintained and the level of the benefit due deteriorates, it is incumbent upon the State to demonstrate reasoning that aims to ensure the best possible protection of a right or justifiable need (Cf. "El derecho a la Atención sanitaria como Derecho Exigible" by Víctor Abramovich and Cristian Courtis, LL, *Suplemento Derecho Administrativo*, Bs. As 06/25/01)

XI. In the case in question, it is appropriate to analyze how legislation has dealt with the delivery of HIV medication in a State of Emergency such as that currently present in Argentina.

On this point, it is important to highlight that individuals carrying the HIV virus, who have a health care plan, continue to be provided full health coverage.

In this respect, we can observe that the Mandatory Emergency Health Program (PMOE) is regarded as the minimum program of Health Care benefits that must be provided, with some limitations (see Considering clause of Res. 930/2000 of the Ministry of Health, as amended through Res. 201/2002).

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However, any restriction of this coverage shall not affect the rights to life or health of individuals, which are enshrined in the Constitution (CS, Judgments 323: 1339).

It is stated in the above mentioned PMOE - approved through Res. 201/2002 as part of the faculties granted in Dec. 486/2002 concerning National Health Emergencies - that the general goals of the Program include: improvement of the health system to prevent the social-economic crisis in question from having any impact on health; the resumption of access to medication, and; the guarantee of continued Social Security services, particularly for the most vulnerable groups in society.

As such, the approach of the STATE constituted a clearly arbitrary and illegal distortion and threat to the rights to life and health under the terms of Articles 14 bis, 16, 28, 31, 33, 42, 43 and 75, Subsection 22 of the Argentine Constitution, and there have been no legislative, legal or argumentative elements provided in the proceedings to justify this having been overlooked.

We can thus conclude that the State may not use the occurrence of an emergency situation as an argument to justify its failure to provide medication in a timely manner, as this would contradict its assumed obligation.

XII. We shall now analyze the principle of "factual determinability"-

From this perspective, the State is the only entity that can viably respect, guarantee or satisfy the right

allegedly violated in these proceedings. This brings us to the conclusion that, based on the premises of the case and the provisions of law, it is the obligation of public authorities to provide the elements requested by the petitioner in the opening petition, since any decision otherwise would breach the solidarity and equality principle in view of the fact that, whereas individuals in possession of welfare benefits would have their right to health guaranteed, the right to a decent life of parties without these benefits would be violated.

Nevertheless, it is important to clarify at this point that, for the Plan to function properly, not only must it be observed by the juxtaposition of the agents therein and the means available, or its passive presence or potential use; rather, the facts stated above must also be actively articulated to each patient, at all times.

The above is true because each time an individual requires medical attention, the entire system is set into action, and any failure to activate any of the system's parts - such as the provision of care and assistance, or the delivery of medication - will compromise the responsibility of the entity entrusted with the management and control of the health system, which could affect the recovery of the patient by means of delay or greater difficulty of providing health care. One example of such a disarticulation in the operation and enforcement of the National Plan is demonstrated through the documentation inserted on pp. 363/66 - which has drawn no comment from the defendant - in which a doctor from the

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STD/Aids Control Program of the Chaco Province reports the difficulties encountered.

XIII. At this point, we must analyze the reasonability of the limitation imposed by the NATIONAL STATE and the requirements of the Argentine Constitution, as well as the willingness to act demonstrated in legislation.

Having analyzed the right violated and the limitation currently imposed by the State, the case appears to present no reasons of public interest, the common good, or moral or health grounds, which would justify the State not meeting the obligations to which it has undertaken.

Indeed, it is the right to health that has been violated, and its potential impact on general society means that the public interest is infringed upon if adequate protection is not provided.

Consequently, not only is the delay tactic employed by the State in the delivery of medication under the National Program entirely unreasonable; it also infringes upon the express provisions of the Argentine Constitution and Law 23,798.

XIV. Furthermore, with regard to the principle of solidarity, it is not clear in this case how the State would be affected in economic terms by having to fund the medication required by individuals affiliated to the Program, and it must be taken into account that public health cannot be subject to the whims of the market or any wait for the national economy to improve (see report from the Ministry of Health on pp.

131/3).

The regulation cited in the Considering clauses of this instrument are applicable in this case, given that they constitute the minimum standards that legislation must impel the State to observe.

XV. Furthermore, it is unequivocal in the case before us - with no need for further evidence - that the medication requested and indicated under law is necessary for all parties afflicted by HIV to fight their illness.

Therefore, on account of the present state of health of the petitioners, the refusal to admit the petition would imply a departure from the protection of the fundamental rights guaranteed by the Argentine Constitution and the international treaties that form part thereof (Article 75, Subsection 22 of the Constitution).

Finally, in light of the principle of justice, looking at how the values in question can be best protected from the point of view of third parties and society in general - particularly in reference to a better distribution of health resources, social solidarity and the impact on the constitutional right to health care - it is appropriate to follow the Italian criteria arising from the judgment to the "Di Tella" case of 05/20/98, which establishes that "the enjoyment of the basic right to health cannot depend on the differing economic conditions of each care recipient" (cf. *La Ley Provincia de Buenos Aires* 9, October 2001, p. 1252: First Court of Criminal and Corrective Matters of Mar del Plata 05.25.01 "B.A re: Amparo")

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In view of this perspective, in which the right to health is regarded as a basic human right, we should recall that the Preamble to the WHO asserts that "the enjoyment of the highest attainable standard of health is one of the fundamental rights of every human being without distinction of race, religion, political belief, economic or social condition". This philosophy, restated by the WHO in numerous subsequent documents, demonstrates the need to address this petition.

Any failure by the Courts to provide a favorable, timely and effective response would constitute a breach of the Constitution, to the detriment of the health of the Program's beneficiaries.

XVI. By virtue of the foregoing considerations, the claim of the petitioners is hereby deemed admissible, and the defendant is urged to take all relevant measures to resume the delivery of the medication required by the treating physician in a continuous and uninterrupted manner - with no suspension of provision - since failing to do so would constitute behavior in breach of Law 23,798 and its regulation.

Any decision otherwise would lead the State to forgo the protection of the basic human rights guaranteed by the Argentine Constitution, International Treaties, and all other conventions that it must submit to when taking decisions (Cf. Arg. Fourth Court of Civil and Commercial Matters, Case 3973/02 of 08.29.02; Second Chamber, Case 3912 of 08.20.2002);

such a decision would be inadmissible on account of the fact that, as upheld by the Supreme Court of Justice of the Nation, all other values are documentary in nature in comparison to the right to life.

XVII. Therefore, the petition must be held as admissible, and the defendant must assume all costs of this proceeding based on the "loser pays" principle (Article 68), as well as the provisions of Article 14 of Law 16986; no circumstances shall authorize the moderation of this criterion, since the proceedings demonstrate that it the petitioners were obliged to file this writ of *amparo* or relief proceeding petition in the interests of having their rights recognized by law, insofar as it was the manifestly arbitrary behavior - perpetrated with no legal basis - of the defendant that gave rise to the writ of *amparo* or relief proceeding, and this circumstance is deemed sufficient circumstance for the costs of the completed proceedings to be awarded to the defendant (Article 70, Subsection 11 of the CPCC).

In view of the foregoing, of constitutional, legal and case law precedents, of the premises of the case, of the study of all evidence provided by the parties, and of the arguments expounded, I hereby RESOLVE: 1) That this writ of *amparo* or relief proceeding petition filed by A.V. and C.M., and the Center of Legal and Social Studies, representing all beneficiaries of the Aids program, is duly admitted, with costs awarded to the defendant. 2) That the State is ordered to adopt all measures necessary to ensure and resume the continuous and uninterrupted delivery of the medication



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required by all beneficiaries of the Aids Program and the petitioners, A.V. and C.M., so that they may continue their respective treatments as specified in their medical prescriptions. 3) That on account of the merit, scope and efficacy shown in this case, it is ordered that the fees for the learned direction of Dr. Pablo Ceriani Cernadas be set at [Illegible text] PESOS, with the sum of [Illegible text] PESOS for the expertise of Dr. Julieta Rossi. 4)

It is ordered that it be Recorded, Notified and promptly DOCKETED.

[Illegible signature]